

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**JACKSON COUNTY BOARD OF ELECTION
COMMISSIONERS, BY AND THROUGH ITS
MEMBERS TAMMY L. BROWN, WILLIAM J.
BAKER, CHARLES E. DUMSKY, AND MICHAEL D.
WHITEHEAD,
APPELLANT,**

v.

**CITY OF LEE'S SUMMIT, MISSOURI,
RESPONDENT.**

WD69074

DATE: December 23, 2008

Appeal From:
JACKSON COUNTY CIRCUIT COURT
THE HONORABLE MARCO ANTONIO ROLDAN, JUDGE

Attorneys:
Bradley Alan Constance, Esq., Independence, MO, **for appellant.**

Paul Anthony Campo, Esq., Lee's Summit, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS – WESTERN DISTRICT

JACKSON COUNTY BOARD OF ELECTION COMMISSIONERS,
BY AND THROUGH ITS MEMBERS TAMMY L. BROWN,
WILLIAM J. BAKER, CHARLES E. DUMSKY, AND
MICHAEL D. WHITEHEAD,

APPELLANT,

V.

CITY OF LEE’S SUMMIT, MISSOURI,

RESPONDENT.

WD69074

Jackson County

Before Division Four Judges: Thomas Newton, C.J., Ronald Holliger and Alok Ahuja, JJ.

On August 10, 2006, the City Council of Lee’s Summit adopted two ordinances that amended the City’s Code of Ordinances to prohibit smoking in all workplaces and public places in Lee’s Summit.

The first, Ordinance No. 6250, banned smoking in workplaces and public places in the City with certain exceptions. The second, Ordinance No. 6251, was similar to Ordinance No. 6250, but repealed Ordinance No. 6250’s exception for bars and restaurants. Section 3 of Ordinance No. 6251 provided “[t]hat this ordinance shall be referred to the people for approval and shall be in full force and effect from and after the date of its approval by a majority of the votes cast thereon.”

On August 28, 2006, the Lee’s Summit City Clerk notified the Jackson County Board of Election Commissioners that the City Council had called a special municipal election to be held on November 7, 2006 concerning repeal of Ordinance No. 6250’s exemption for bars and restaurants, and requested that the Board place the question on the ballot.

On September 11, 2006, the Board filed this lawsuit against Lee’s Summit, requesting a declaratory judgment as to whether the Board was required to place this issue on the November 7 ballot. The Board argues that the Lee’s Summit City Charter prohibits the City Council from enacting ordinances contingent on voter approval.

Because the Board and Lee’s Summit did not believe the circuit court could issue a ruling in time for the November 2006 election, they agreed that the Board would place the issue on the ballot, in exchange for the City’s agreement “not to argue mootness.”

On November 7, 2006, over 70% of Lee's Summit voters voted in favor of Ordinance No. 6251, and shortly thereafter the ordinance took full force and effect.

On October 15, 2007 – almost a year after the election in question – the circuit court issued its judgment, which found that the City “had the authority to call the November 7, 2006 election pertaining to Ordinance No. 6251 . . . and the election so held was authorized by law.” The Board appeals.

REMANDED WITH DIRECTIONS THAT THE CIRCUIT COURT VACATE ITS JUDGMENT AND DISMISS THE ACTION

Division Four holds:

A threshold question in appellate review of any case is the mootness of the controversy. Missouri courts do not decide moot cases. A case is moot if the decision would have no practical effect upon an existent controversy. A moot case raises the issue of justiciability, and therefore courts must address mootness issues on their own motion, whether or not the parties raise it.

The Board's declaratory judgment petition seeks a determination as to the legality of the measure Lee's Summit sought to place on the November 2006 election ballot. That issue was moot by the time the circuit court issued its judgment in October 2007, however, because the election had already occurred and the ordinance had been passed.

Caselaw recognizes a discretionary, narrow exception to mootness “where the issue raised is one of general public interest and importance, recurring in nature and will otherwise evade appellate review unless the court exercises its discretionary jurisdiction.” We deem it inappropriate to invoke this narrow exception here, however. This is apparently the first time any charter city within the Board's jurisdiction has attempted to enact an ordinance in this fashion, and the Board presents only speculation that Lee's Summit or another charter city will attempt to employ the same device in the future, and thereby raise the same legal issue. Further, because Ordinance No. 6251 is now in effect, persons subject to its provisions (restaurants and bars, and potentially their employees or patrons) could challenge the ordinance, and raise the issues the Board seeks to argue here. The fact that the same issue could be raised, and decided, in a future live controversy also counsels against deciding the issues in this case.

Because the case is moot, this Court does not have jurisdiction to address the merits. Moreover, because the case was moot when the circuit court issued its October 2007 judgment, we remand with the direction that the circuit court vacate its judgment and dismiss the action.

Opinion by: Alok Ahuja, Judge

December 23, 2008

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